LIONG SEOW KENG & ORS v. HO SOON CHENG

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[ORIGINATING SUMMONS NO: 24NCVC-646-05-2014]
23 SEPTEMBER 2014

SUCCESSION: *Will – Administration of estate – Trustee entrusted with selling, calling and conversion of residuary estate into money and transfer of proceeds to beneficiaries – Breakdown of relationship between trustee and beneficiaries – Application for removal of trustee – Whether there was sufficient cause to remove trustee*

TRUSTS: *Trust property – Sale – Will – Declaration of trust for sale and conversion of residuary – Will stipulated that wealth to be distributed among beneficiary children after they each attain age of 25 – Application for termination of trust for sale and for transfer of residuary estate in specie – Whether beneficiaries legally competent to end trust for sale*

TRUSTS: *Trustees – Removal – Administration of estate – Breakdown of relationship between trustee and beneficiaries – Allegation of misconduct of trustee – Application to remove and replace trustee – Whether there was sufficient cause to remove trustee – Whether trustee guilty of any serious or grave misconduct in discharge of duties – Whether warranted dismissal – Whether estate will be administered satisfactorily if trustee remains*

The deceased ('Mr Quah') left a will appointing the defendant as the sole executor and trustee. By cl. 9, Mr Quah declared a trust for sale and conversion ('trust for sale') in respect of his residuary estate which comprised ten units of condominiums and 250,000 shares. The trust for sale required the defendant to sell, call and convert the residuary estate into money and to transfer the proceeds of the same to Mr Quah's sons, the second to fourth plaintiffs, in equal shares when they each attain the age of 25. When Mr Quah died, his will was proved by the defendant and probate was granted. The defendant notified the second plaintiff that 95% of the estate had already been called in and a sum of RM90,000,000 was ready for distribution. The defendant suggested that the distribution be done in three stages; the first stage when the second to fourth plaintiffs attain the age of 25; the second stage ten years later; and the third stage another ten years later. Dispute ensued when the plaintiffs disagreed to purchase an endowment plan for the third stage from Prudential Assurance Bhd, through the defendant's wife. In the present application, the plaintiffs sought (i) the removal and replacement of the defendant as the executor of the will on the grounds that the defendant was in breach of his fiduciary duty and that there was a breakdown of relations between the parties; or (ii) in the alternative, the termination of the trust for sale. The issues that arose for the court's

A adjudication were (i) whether the plaintiffs had shown sufficient cause for the defendant's removal as executor and trustee of the will; and (ii) whether the plaintiffs, who were *sui juris*, were competent to end the trust for sale.

Held (allowing application to end trust for sale):

B **(1)** There was no sufficient cause for the defendant to be removed as the executor and trustee. The facts did not show that the defendant was guilty of any serious or grave misconduct in the discharge of his duties so as to warrant his dismissal. There was no issue of conflict as the plaintiffs did not purchase any endowment plan from the defendant's wife. It would be a sheer waste of financial resources and would C contribute to further delay in the administration if a new person were to be substituted as executor at this stage when the administration is nearing completion. The matter complained of by the plaintiffs did not provide a real basis for supposing that, if the defendant remains as executor and trustee, the estate will not be administered satisfactorily, D nor that the welfare of the beneficiaries calls for a change. (paras 40, 50 & 51)

(2) Case authorities established that beneficiaries under a trust for sale have no right to the assets of the estate but a share of the proceeds of sale when E the assets are sold. However, this rule has no application when the beneficiaries, who are *sui juris* and together entitled to the whole beneficial interest, can put an end to the trust and direct the trustees to hand over the trust property as they may direct. The rule in *Saunders v. Vautier* is applicable to the facts in this case. The plaintiffs were justified in calling on the trustees to hand over to them the ten condominiums and F the shares for distribution amongst themselves. As beneficiaries who were *sui juris* and together entitled to the whole beneficial interest of the trust, the plaintiffs can put an end to the trust. (paras 64, 66 & 67)

Case(s) referred to:

G *Aberdeen Railway Co v. Blaikie Brothers [1843-60] All ER Rep 249* ***(refd)***
Arumugam Ponusamy v. Karupiah Ramasamy & Ors [2005] 4 CLJ 805 CA ***(refd)***
Chia Chiew Neo (Spinster) v. Tan Thian Chye & Anor [1932] 1 LNS 10 HC ***(refd)***
Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1998] 4 CLJ 81 CA ***(refd)***
Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538 CA ***(refd)***
Goulding v. James [1997] 2 All ER 239 ***(refd)***
H *Letterstedt v. Broers (1884) 9 App Cas 371* ***(refd)***
Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors [2012] 1 LNS 167 HC ***(refd)***
Re Consiglio Trusts (1973) 36 DLR (3d) 658 ***(refd)***
Re Horsnail, Womersley v. Horsnail (1909) 1 Ch 631 ***(refd)***
Re Khoo Boo Gong, Decd Khoo Teng Seong v. Teoh Chooi Ghim & Ors [1981] 1 LNS 78 FC ***(refd)***
I *Re Kipping, Kipping v. Kipping [1914] 1 Ch 62* ***(refd)***
Saunders v. Vautier (1841) 4 Beav 115 ***(foll)***
Tenkard v. Midland Bank Executor & Trustees Company Limited [1941] 3 All ER 458 ***(refd)***
Wong Chun Wah v. Kok Kam Chee [2008] 3 CLJ 510 CA ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, ss. 34, 43

Other source(s) referred to:
Francis Barlow et al eds, *Williams on Wills*, LexisNexis Butterworths, 9th edn, 2008, vol 1, paras 49.1-49.2
Megarry & Wade: The Law of Real Property, Sweet & Maxwell, 8th edn, 2012, paras 10-007
Snell's Equity, 31st edn, London, 2005, paras 27-25
Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 19th edn, paras 60-14

For the plaintiffs - Harmeet Singh; M/s Raja Eleena Siew Ang & Assocs
For the defendant - Raymond Mah (Choo Mun Wei with him); M/s Mah Weng Kwai & Assocs

Reported by Najib Tamby

JUDGMENT

SM Komathy JC:

Introduction

[1] This is an application by the plaintiffs for the defendant to be removed as executor and trustee of the will of the late Mr Quah Chin Cheng ("Mr Quah"). In the alternative, the plaintiffs seek an order that the trust for sale and conversion in the will be terminated and the real and personal properties in the residuary estate be immediately transferred in specie ("in their present form") to them instead of being sold. The first plaintiff is the wife of Mr Quah and the second to the fourth plaintiffs are his sons.

Factual Background

[2] It is desirable, before proceeding to discuss the issues in this case, to state so much of the facts as are necessary to understand what gave rise to the disagreement between the beneficiaries and the executor. Mr Quah was a wealthy man who had amassed substantial wealth in his lifetime and had properties in Malaysia, Hong Kong and in Australia.

[3] He died on 10 October 2012 leaving a will dated 17 September 2012 appointing the defendant as the sole executor and trustee. By cl. 5, Mr Quah devised and bequeathed his property known as No. 366, Jalan Pemancar 11700, Gelugor, Penang ("the property") to his three sons in equal shares upon trust until they attained the age of 25 years. By cl. 8, Mr Quah bequeathed a sum of RM5,000,000 to his wife.

[4] By cl. 9, Mr Quah declared a trust for sale and conversion ("trust for sale") in respect of the whole of his residuary estate to his three sons. The trust for sale required the defendant to sell and call in and convert the

residuary estate into money and thereafter to transfer the proceeds of the residuary estate to the second to fourth plaintiffs in equal shares, when they each attained the age of 25.

[5] The residuary estate of the testator comprised of ten units of condominiums in a project known as Pavilion Resort in Penang and 250,000 ordinary shares in Cosyland (M) Sdn Bhd ("Cosyland") which owns property valued at approximately RM17,638,139.60.

[6] Shortly after Mr Quah's demise, his will was proved by the defendant and probate was granted on 5 March 2013 and the same was issued by the Registry of the High Court of Penang on 19 March 2013.

[7] By an email dated 26 July 2013, the defendant notified the second plaintiff that 95% of the estate had already been called in and was ready for distribution. There was a sum of RM90,000,000 in cash for distribution.

[8] The plaintiffs and the defendant then entered into negotiations to vary the method of distribution of the estate from that willed by Mr Quah. It was suggested by the defendant that the distribution be done in three stages: with the first stage upon the second to fourth plaintiffs attaining the age of 25, followed by the second stage ten years later and the third stage another ten years later. The parties also discussed the purchase of an endowment plan to preserve the funds for the third stage of distribution and the variation of the first plaintiff's share of RM5 million in the estate, by the payment of cash in the sum of RM4,316,432 and one unit of condominium in Pavillion Resort.

[9] Problems surfaced between them when the plaintiffs were not agreeable to purchase an endowment plan for the third stage from Prudential Assurance Berhad through the defendant's wife. They expressed their preference to purchase the endowment plan from Tokio Marine Life Insurance Malaysia Berhad. The relations between the parties started to get fractious when they separately engaged lawyers to deal with their differences. Each party seemed determined to thwart the actions and intentions of the other.

[10] The plaintiffs by their solicitors letter dated 10 September 2013 requested for the estate to be called in without delay and sought payment of the first plaintiff's share of RM5,000,000 pursuant to cl. 8 of the will. The defendant, on the advise of the estate's solicitors, concluded on the basis of the letter that the discussions on the variation of the distribution of the estate were unsuccessful and that he should proceed with his duties as executor in accordance with the provisions of the will. Accordingly, on 3 December 2013 the defendant paid to the first plaintiff the sum of RM5,000,000.

[11] On 9 May 2014, the defendant filed an originating summons in the Penang High Court to compel the second and third plaintiffs in their capacity as directors of Cosyland to convene an adjourned annual general meeting to appoint himself and one Lim Bian Chai as directors. The order was sought to enable the sale of the Cosyland shares in accordance with cl. 9 of the will.

The Present Proceedings

[12] On 2 May 2014, the plaintiffs instituted the present originating summons for the following reliefs:

(i) to remove and replace the defendant as the executor of the will; and

(ii) in the alternative, to terminate the trust for sale.

[13] In response, the defendant counterclaimed for the following orders:

(i) a declaration that the defendant as executor and trustee of the estate of Quah Chin Cheng is bound and entitled to comply with cl. 9 of the last will and Testament of Quah Chin Cheng dated 17 September 2012, which expressly required the defendant as executor and trustee to sell and call in and convert the residuary estate into money and thereafter to transfer the proceeds of the residuary estate to the second to fourth plaintiffs in equal shares, provided that they have each attained the age of 25 years; and

(ii) an order restraining the plaintiffs from interfering with the efforts of the defendant as executor and trustee of the estate of Quah Chin Cheng to sell and call in and convert the residuary estate into money for the purpose of complying with cl. 9 of the last will and Testament of Quah Chin Cheng dated 17 September 2012.

[14] The plaintiffs application for the removal of the defendants as the executor and trustee is made under s. 34 of the Probate and Administration Act 1959 ("1959 Act"). It provides as follows:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

[15] The plaintiffs seek the removal of the defendant on the following six grounds. Firstly, there is genuine concern that the defendant is in breach of his fiduciary duty in insisting that the plaintiffs each purchase the endowment plan under the "third stage" from the defendant's wife despite being fully aware that she would be entitled to benefit from a substantial commission in the event they agreed and purchased it from her. The defendant did not provide them with any other alternative endowment plans except for Prudential Assurance.

[16] Secondly, the defendant has failed to furnish them with proper accounts of the estate. Without the accounts being rendered periodically or at all, the beneficiaries would not have the means of knowing whether the estate is being administered properly. The accounts were only furnished after the filing of this application.

[17] Thirdly, the defendant has allowed personal feelings to interfere with the execution of his duties and this has shaken their confidence in his ability to continue to act as executor and trustee and in their best interests.

[18] Fourthly, the defendant had demanded for an executor's fee at 2.5% of the value of the estate at the meetings on 20 August 2013 and 28 August 2013. It is unjust and wrong in law for the defendant to demand for such a fee as pursuant to s. 43 of the 1959 Act, the power of awarding commission to an executor rests solely at the discretion of the court.

[19] Fifthly, there has been inordinate delay in calling in the remaining 5% of the estate and in making the distribution of the RM90,000,000 cash that was available for distribution to the beneficiaries. The defendant owed a duty to the plaintiffs as beneficiaries to call in and collect the estate with due diligence as the ultimate objective of administration of an estate is to place the beneficiaries in possession of their interest. See *Tenkard v. Midland Bank Executor & Trustees Company Limited* [1941] 3 All ER 458.

[20] Sixthly, there is a breakdown in relations between them and the defendant.

[21] In his reply, the defendant explained that his proposal to purchase the endowment plan from his wife was consistent with Mr Quah's wishes as verbally expressed to him when he and his wife had lunch with Mr Quah on 8 October 2012 to discuss how his wealth was to be preserved and distributed to his sons. On the complaint of failure to render accounts, he explained that the statement of accounts as at 5 May 2014 for the period from 24 April 2013 to 5 May 2014 have been rendered to the plaintiffs. Additionally, all queries and information sought by the plaintiffs in relation to the accounts have been given and there have been no further inquiries on the accounts of the estate.

[22] On the next three complaints of the plaintiffs, the defendant refuted them as being made without any factual basis. He denied that he had demanded for executor fees at the meetings and delayed the administration of the estate. Any delay in the administration of the estate was caused by the second to fourth plaintiffs themselves, in particular by concealing funds from the estate and by opposing the sale of the Cosyland shares. The defendant did not dispute that there has been a breakdown in relations between the parties.

[23] The defendant went on to allege in his affidavit that the second to fourth plaintiffs are not entitled to seek any relief from the court as they had concealed funds belonging to the estate that were in a bank account in Australia. It was only paid to the estate just before the filing of this action to ensure that they would not be accused of having come to court with unclean hands. The defendant urged the court to apply the equitable principle of clean hands and dismiss the application as explained in *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538 and *Wong Chun Wah v. Kok Kam Chee* [2008] 3 CLJ 510; [2008] 3 MLJ 176.

Clause 9 Of The Will

[24] The trust for sale in cl. 9 of the will, which the plaintiffs seek to terminate, states:

> Subject to the payment of all my just debts, medical, funeral and testamentary expenses, I further devise and bequeath all my real and personal estate whatsoever and wheresoever not hereby or by any codicil hereto otherwise specifically devised and bequeathed unto my Trustee upon trust to sell and call in and convert the same into money (with power in their absolute discretion to postpone such sale calling in and conversion) and after payment thereout of my legacies bequests and gifts, to divide such residuary estate of mine and the accumulated income thereon (if any) to the following persons in the following proportions:

[25] It is common ground that cl. 9 imposed on the defendant as trustee a fiduciary obligation to dispose of the residuary estate by converting it into cash before distribution.

Principles Governing The Construction Of Wills

[26] The first and principal rule to which all others must give is that effect must be given to the intention of the testator; see *Williams on Wills* (Francis Barlow et al eds) (LexisNexis Butterworths, 9th Ed, 2008) (at vol 1, paras 49.1-49.2). The application of the rule involves two questions of construction: first, what is the intention of the testator disclosed by the will; and secondly, how effect can be given to that intention.

[27] The case law on this subject unanimously state that the overriding aim of the court in construing a will is to seek and give effect to the testamentary intention as expressed by the testator. It is the sole right and discretion of a testator to determine, through his will, how his assets are to be managed or disposed of on his death and who should administer his estate. It has been said that a testator does not will in vain but does so in the expectation that his wishes would be complied with and that his chosen executor and trustee should be permitted to administer his estate after his death.

Trust For Sale And Conversion

[28] In *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 8th edn, 2012) at paras 10-007 defines the trust for sale as:

> A trust for sale was a trust which directed the trustees to sell the trust property, invest the proceeds, and hold the resulting fund upon the trusts declared by the settlor. Its objects and operation were therefore quite different from those of a strict settlement. Instead of aiming to preserve a family estate intact, as did the old strict settlement, the trust for sale set out by treating the property as so much potential money. Dividing it among the family was therefore easy ...

[29] The device of a trust for sale rests on the operation of the doctrine of conversion. This is based on the maxim "equity looks on that as done which ought to be done". Hence if there is a trust for sale of land (realty), equity notionally regards that land as money (personalty) from the moment the trust instrument takes effect. Under the doctrine of conversion, the residuary estate is deemed to be sold at the moment the trust for sale arises - regardless of when it is actually sold - and the trusts created by the deed are trusts of its proceeds of sale. A trust for sale is mandatory, and imposes upon the trustee a duty to sell and convert.

[30] The Court of Appeal in *Arumugam Ponusamy v. Karupiah Ramasamy & Ors* [2005] 4 CLJ 805, explained the doctrine of a trust for sale as:

> In accordance with modern equity jurisprudence, express trusts are all regarded as trusts for sale. A trust for sale is one under which the trustees are under a duty to sell with a power to postpone sale. This is because Equity always regarded a trust for sale as personalty and not realty, even where the subject matter of the trust was land.

[31] There are advantages to be gained in using trusts for sale. All sorts of property can be brought under a single trust, and trustees holding the legal estate can choose to sell or retain the land with the beneficiaries' interests in mind. There is no requirement for trustees for sale to make an immediate sale of the land. Trustees are very often given the widest discretion as to the time at which they should sell with a power to postpone the sale for so long as they thought fit. Accordingly, a postponement of a sale does not *ipso facto* amount to a breach of trust.

Issues

[32] Two points arise for decision in the present case. The first is whether the plaintiffs have shown sufficient cause for the defendant's removal as executor and trustee of the will. The second is whether it is competent for the plaintiffs who are *sui juris* to put an end to the trust for sale.

Law On Removal Of Executor And Trustee

[33] On the test to be applied on the question whether an executor and personal representative should be removed and replaced by order of the court, the principal authority is the decision of the Chang Min Tat FJ in *Re Khoo Boo Gong, Decd Khoo Teng Seong v. Teoh Chooi Ghim & Ors* [1981] 1 LNS 78; [1981] MLJ 68 wherein His Lordship had observed:

> The power to revoke a grant of probate or letters of administration is vested in the High Court by section 34 of the Probate & Administration Act, 1959 (Rev. 1972) and can be exercised for "any sufficient cause". However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154, "the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties

beneficially entitled thereto", then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.

[34] The Court of Appeal in *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1984] 4 CLJ 81 applied the test laid down in *Khoo Boo Gong* to remove the executor on account of his failure to administer the estate in the interests and welfare of the beneficiaries. The executor had taken no steps to extract the grant of probate made in his favour for seven years and provided no accounts to the beneficiaries. See also *Arumugam Ponusamy v. Karupiah Ramasamy & Ors* [2005] 4 CLJ 805.

[35] I was also referred to the decision of the Privy Council in *Letterstedt v. Broers* (1884) 9 App Cas 371, 53 LJPC 44, [1881-5] All ER Rep 882, in which the court's power to remove and replace a trustee was confirmed and discussed. In *Letterstedt v. Broers*, Lord Blackburn, at pp. 385-386, referred with approval to the discussion in *Story's Equity Jurisprudence* at s. 1289:

> But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

[36] He continued, at p. 386:

> It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

[37] The thrust of the above quoted authorities quoted is that the court will be slow to remove an executor appointed by the testator and its power to do so is in not limited to only cases of misconduct. The paramount consideration in an application to remove an executor and trustee is whether the trust is being properly executed and the welfare of the beneficiaries. An executor and trustee who does not discharge his duties fairly and conscientiously or cannot be expected to carry out the administration of the

A estate in an effective and proper manner can be removed and replaced. Hostility between the beneficiaries and executor and trustee per se is not a ground for removing an executor.

First Issue: Whether There Are Sufficient Grounds To Remove Defendant?

B **[38]** Guided by these principles, I now turn to consider whether the plaintiffs have shown sufficient cause for the removal of the defendant. As noted earlier, the plaintiffs rely on misconduct by the defendant and breakdown of relations between them as the two main grounds for his removal.

C Misconduct

[39] On the allegation of misconduct, in my judgment, the facts do not show that the defendant is guilty of any serious or grave misconduct in the discharge of his duties so as to warrant his dismissal. It is common ground that the defendant has called in 95 % of the estate and the residuary estate D which remains to be called are essentially the ten condominiums and the Cosyland shares.

[40] However, I must confess that the defendant's insistence on the plaintiffs purchasing the endowment plan from his wife has caused me much E anxiety. A trustee owes a fiduciary duty to the beneficiaries and is not allowed to enter into engagements in which he has or can have a personal interest which conflict or which may possibly conflict with the interest of those whom he is bound to protect. This leading case bearing on this issue is *Aberdeen Railway Co v. Blaikie Brothers* [1843-60] All ER Rep 249. In that case, Lord Cranworth LC explained that, "So strictly is this principle F adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into". In the instant case, as no endowment plan was purchased from the defendant's wife, in my view, the issue of conflict does not arise.

G **[41]** That said, I proceed to consider whether the breakdown of relations between the plaintiffs and the defendant justifies the latter's removal as executor and trustee.

Breakdown In Relations Between An Executor And A Beneficiary

H **[42]** The plaintiffs seek to remove the defendant on the basis that the degree of hostility and distrust between them has the potential to create difficulties in the administration of the estate.

[43] The question of when a breakdown in relations between an executor and a beneficiary constitutes a sufficient cause for the removal of an executor was addressed in *Letterstedt v. Broers* (at [29]). Lord Blackburn said: I

> As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially

> interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported.

[44] He added, however, at p. 389:

> It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

[45] The editors of *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th edn) at paras. 60-14 comment:

> ... if the administration has come to a standstill because relations between the personal representatives have broken down, or relations between the representatives and the beneficiaries have broken down, the court will ordinarily remove the personal representatives and appoint new ones to enable the administration to be completed. It is not necessary to establish wrongdoing or fault by the personal representative to obtain his removal. If, for whatever reason, (such as clash of personalities, or the lack of confidence in the personal representative by the beneficiaries, even if unjustified) it has become impossible or difficult for the administration to be completed by an existing personal representative, then an order for his removal will usually be made.

[46] In the Canadian case of *Re Consiglio Trusts* (1973) 36 DLR (3d) 658, the Ontario Court of Appeal affirmed a decision removing three trustees (one at his own request) and appointing a trust corporation as trustee in their place. In that case, there was evidence which demonstrated there were widespread misunderstandings among the trustees from the start that had resulted in accusations and bitterness and it became virtually impossible for them to agree on the efficient management of the trust. The application was opposed on the basis that no misconduct had been shown on the part of any of the trustees, but Kelly JA, giving the judgment of the court explained:

> It is our view that misconduct on the part of a trustee is not a necessary requirement for the Court to act and that the Court is justified in interfering, and indeed required to interfere, when the continued administration of the trust with due regard to the interests of the *cestui que* trust has by virtue of the situation arising between the trustees has become impossible or improbable.

[47] The Court of Appeal in *Damayanti Kantilal Doshi (supra)* cited with approval the observations of Lord Blackburn in *Letterstedt v. Broers* on this subject. The court held that the relations between the beneficiaries and executor had degenerated to such an extent that it had become impossible for the executor to discharge his duties fairly and impartially and allowed him to be replaced. The court noted (at 273):

> From the facts adduced and the various suits filed in various courts by the respective parties, it is undoubtedly clear that as between the appellants in particular the second appellant and the first and second respondents, there exists not just animosity or disagreement between them but that their relationship can safely be said to be one of open and active hostility. That relationship is such that it would be nigh impossible for the second appellant to fairly and impartially discharge his duties towards the respondents/beneficiaries.
>
> This hostility has manifested itself in the endless litigations commenced by both parties against each other and these actions have produced a number of interlocutory orders that were sought and obtained in the form of injunctions, discoveries and appointment of receivers. This in turn have led to allegations of non-compliance with court orders which culminated in actions for contempt. There has not been any denial that estate funds were being utilised to finance the spate of cases which may not see the light at the end of the tunnel. On the criminal side, the first respondent was initially accused of the murder of the deceased. This murder charge was subsequently withdrawn and substituted with a charge of voluntary causing grievous hurt. The first respondent contends that the second and third appellants were responsible for making false allegations against him, resulting in the criminal proceedings. If this is not clear evidence of direct and open hostility, we do not know what is.
>
> While it is true that friction or hostility between the parties per se may not be a good reason for the removal of the appellants as the executrix and the executor, such hostility if grounded in the manner in which the estate is being administered or not being administered, is a matter that ought not to be disregarded.

[48] The authorities establish that hostility towards the executor on the part of the beneficiaries does not of itself mean that the executor is unsuitable to administer the estate. Friction or hostility between them will justify his removal if the degree of animosity and distrust between them is obstructing the administration of the estate and has the potential to cause or impact adversely on the administration on the estate.

[49] Applying the principles discussed earlier to the facts of the present case, it is evident that the relationship between the parties is no longer cordial and there is hostility between them. There is no longer any direct communication between them in relation to the administration of the estate since the last meeting held on or about 28 August 2013. All relevant inquiries and request are made between the parties *vide* the respective solicitors. It is common ground that the present proceedings represent the second piece of

litigation between the parties. It testifies to the hostility which exists as between them and indicative, too, that the plaintiffs were expressing dissatisfaction with their father's choice of executor and trustee.

[50] It cannot be gainsaid that the administration of the estate could be carried out more expeditiously and cost effectively if the parties were on good terms. I would have thought that the defendant coming into continual conflict with the plaintiffs and their legal advisers would have been relieved to resign to get out of an invidious and disagreeable position. But that is not the case here. The defendant wants to complete the duties entrusted to him by Mr Quah. He is nearly done. In my view, it would be a sheer waste of financial resources and contribute to further delay in the administration if a new person were to be substituted as executor at this stage when the administration is nearing completion.

[51] In all the circumstances, I am not persuaded there is sufficient cause for the defendant to be removed as executor and trustee. The matters complained of by the plaintiffs do not provide a real basis for supposing that, if the defendant remains as executor and trustee, the estate will not be administered satisfactorily, nor that the "welfare of the beneficiaries" (to use Lord Blackburn's phrase in the *Letterstedt* case) calls for a change.

[52] I must next go on to consider the alternative prayer of the plaintiffs for the court to intervene to terminate the trust for sale declared by Mr Quah in cl. 9 of the will.

Issue Two: Trust For Sale

[53] The second to fourth plaintiffs argue that because they are all of the age of majority and are all in mutual agreement that the said trust for sale be terminated, the defendant is obliged to comply with their demand to do so. They want all real and personal properties in the residuary estate be immediately transferred in their original form to them in equal shares. The plaintiffs rely on the English case of *Saunders v. Vautier* (1841) 4 Beav 115 for the position they take. The case is reported for the well-known principle that, where a beneficiary has an absolute indefeasible interest in the gift, he is not bound to wait until attaining the required age before being able to call for payment of the legacy.

[54] In *Saunders v. Vautier* the testator had left all the East India stock that he owned to his executors and trustees to hold on trust for the beneficiary until the beneficiary attains the age 25. Upon reaching the age of 21, the plaintiff, who was a beneficiary, demanded that the East India stocks be transferred to him. The court gave judgment for the beneficiary. Lord Langdale MR held:

> When a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

[55] The rule in *Saunders v. Vautier* is set out in the 31st edn of *Snell's Equity* (London, 2005) at paras. 27-25 in the following terms:

> Although the beneficiaries cannot, in general, control the trustees while the trust remains in being, or commit them to particular dealings with the trust property, they can, if *sui juris* and together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust property as they direct; and this is so even if the trust deed contains express provisions for the determination of the trust.

[56] The plaintiffs also rely a passage in *Todds & Wilsons Textbook on Trust* (8th edn.) which was cited with approval by Harminder Singh JC (as he then was) in *Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors* [2012] 1 LNS 167; [2012] 5 MLJ 109. The passage reads:

> Although the ultimate benefit under a trust goes to the beneficiaries the trustees are concerned not only with their wishes, but also with those expressed by the settlor in the creation of the trust. There is therefore no general principle which permits the beneficiaries to control the way in which the trustees exercise their discretions. Were it otherwise, the trustees would be hopelessly handicapped in fulfilling their overriding duty towards the thrust as a whole and the court will never compel the trustees to act under orders from the beneficiaries where a power or discretion has been entrusted to the trustees alone. This will hold as long as the trust continues, although if the beneficiaries collectively wish they can bring the trust to an end and resettle the property on any terms they wish, under the *Saunders v. Vautier* doctrine.

[57] The defendant, on the other hand, took the position that the principle in *Saunders v. Vautier* had no application to the facts here as the facts in both cases were different. In *Saunders v. Vautier* the testator had given the East India stock in its original form to the beneficiary. The testator did not direct executors to sell the stock and therefore, the trust was not a trust for sale. Accordingly, the beneficiary had an "absolute indefeasible interest" to the East India stock in its original form. In the present case, Mr Quah did not give his residuary estate to the second to the fourth plaintiffs in its original form. In contrast, he had expressly directed the defendant to sell and convert the residuary estate into money before distribution to the plaintiffs. The plaintiffs therefore did not have any "absolute indefeasible interest" in the trust assets.

[58] The plaintiffs case that the defendant was conferred a discretion under cl. 9 to execute the trust for sale and was being unreasonable in disregarding their wishes to terminate it, it was argued, were wholly erroneous and misconceived in law. An executor is required to comply with an express trust for sale and failure to comply with a trust for sale will render him liable to be removed.

[59] The defendant sought to make good his submission by reference to authority. He relied on three cases in particular. In *Chia Chiew Neo (Spinster) v. Tan Thian Chye & Anor* [1932] 1 LNS 10; [1932] 1 MLJ 175A, the testator

gave the whole of his estate to his trustees "upon trust to sell, call in and convert into cash with full discretionary power to postpone such sale, calling in and conversion and to hold the proceeds on trust" for the beneficiaries. Each beneficiary would have an interest in his or her share upon attaining the age of 21. The plaintiff turned 21 and demanded her share to be distributed to her immediately. However, the trustees had yet to sell the trust estate. In dismissing the claim, Murison CJ held that the plaintiff's share was not immediately payable to her because no sale had been made. Murison CJ observed:

> Mr Tan's second point is that as the trustees have full discretion to postpone a sale and conversion there are no assets upon which the rule in *Saunders v. Vautier* can operate, for where land is demised to trustees upon trust for sale, with power to postpone, even a person who is indefeasibly entitled to a share of the proceeds of sale cannot insist on an immediate exercise of the trust for sale against the discretion of the trustees nor can he call for a conveyance of the land (*Theobald*, 8th edition pages 500-1). This is clearly laid down in *Re Horsnaill* (1909) 1 Ch 631 and in *Re Kipping* (1914) 1 Ch 62. In the latter case Buckley LJ (at page 67) said of the applicant - "his contention is that the trustees are bound to sell because he has a right to a distributive share of the residuary estate and to be paid that share. He is not, in my opinion, so entitled. The Will gives him, not a distributive share of a sum of money, but a distributive share of the income of the property so long as it remains unsold, and a distributive share of the proceeds of sale when the property is sold. There is no gift of the proceeds of sale until the property is sold, and he is not entitled to interfere with the *bona fide* exercise by the trustees of their discretion and to call upon them to sell. There is no original gift to him under which he is entitled to have the property sold now".
>
> For these reasons I am of opinion that the Plaintiff's contention must fail. As matters stand at present I hold that the Plaintiff's share is not immediately payable and that until circumstances alter that is until there is a sale and the proper appropriations are made, she cannot get her share before the date of distribution indicated in the Will.

[60] The plaintiff in that case appealed. The decision of Murison CJ was affirmed by the Court of Appeal.

[61] The second case relied on by the defendant is *Re Horsnail, Womersley v. Horsnail* (1909) 1 Ch 631. The testator had devised and bequeathed his residuary estate to his trustees upon trust for sale and conversion and the monies would thereafter be divided in equal 1/3 share to the testator's two sons and one daughter. The trustees were given a right to postpone the sale and conversion. One of the testator's sons had died before distribution and his son, who stood to inherit the 1/3 share, assigned his share to the Reversionary Company, who thereafter sought to direct the trustees to sell the residuary estate. Swinfen Eady J found for the trustees on the basis the Reversionary Company did not have an interest in the residuary estate, but

A only to the proceeds of sale of the residuary estate, and hence could not dictate the trustees' actions with regards to the residuary estate. Swinfen Eady J per the headnote held:

> Where land is devised to trustees for sale with a discretionary power of postponement, and the proceeds are settled in trust for various
B beneficiaries, the vesting in possession of the share of one of the beneficiaries does not put an end to the power of postponement, or entitle that beneficiary to call either for an immediate sale of the entirety or for a conveyance of an undivided share in the land.

[62] The third case relied on by the defendant is *Re Kipping, Kipping v.*
C *Kipping* [1914] 1 Ch 62 where, the testator devised all his residuary estate to the trustees upon trust for sale and conversion with the power in the trustees' absolute discretion to postpone the sale or conversion. Thereafter, the trustees were to hold the proceeds of sale on trust for the testator's children as beneficiaries until they reached the age of 21. The trustees decided to
D exercise their discretion to postpone the sale. One of the beneficiaries attained the age of 21 and sought to direct the trustees to sell the residuary estate. It was held that the beneficiary was not entitled to direct the trustees in the exercise of their duty because the beneficiary did not have a right in the residuary estate. Buckley LJ stated:

E > ... In other words, his contention is that the trustees are bound to sell because he has a right to a distributive share of the residuary estate and to be paid that share. He is not, in my opinion, so entitled. The will gives him, not a distributive share of a sum of money, but a distributive share of the proceeds of sale when the property is sold. There is no gift of the proceeds of sale until the property is sold, and he is not entitled to
F interfere with the *bona fide* exercise by the trustees of their discretion and to call upon them to sell. There is no original gift to him under which he is entitled to have the property sold now ...

[63] It would be apposite to refer to another English case on this matter. In *Goulding v. James* [1997] 2 All ER 239 at 247, Mummery LJ, with whom
G the other members of the Court of Appeal agreed, said this by way of summary of the authorities on this subject:

> First, what varies the trust is not the court, but the agreement or consensus of the beneficiaries ...

H > The 1958 Act has thus been viewed by the courts as a statutory extension of the consent principle embodied in the rule in *Saunders v. Vautier*. The principle recognises the rights of beneficiaries, who are *sui juris* and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations
I of a will or trust instrument.

[64] The authorities show that beneficiaries under a trust for sale have no right to the assets of the estate but a share of the proceeds of sale when the assets are sold. But this rule has no application when the beneficiaries who

are *sui juris* and together entitled to the whole beneficial interest can put an end to the trust and direct the trustees to hand over the trust property as they may direct. In my view, the beneficiary in *Chia Chiew Neo (Spinster)* failed to put an end to the trust as she was not the sole beneficiary under the trust. To allow one of the beneficiaries to terminate a trust would be detrimental to the others.

[65] Reverting to the facts in the instant case, the plaintiffs, as beneficiaries, seek the assistance of the court to put an end to the trust for sale. They say that there is already RM90 million available for distribution amongst them. They therefore want the ten condominiums and Cosyland shares to be distributed to them instead of being sold. It is indisputable that the defendant engaged in discussions with the plaintiffs to vary the distribution of the assets in the estate despite the express terms of the will. In light of this fact, the position taken by the defendant in these proceedings that he is bound by the cl. 9 is incongruous. If indeed this was so, it is strange that the estate's legal advisers had sanctioned the discussions for the variation of the distribution of the estate.

[66] Having considered the conflicting submissions, I accept the plaintiffs submissions that the rule in *Saunders v. Vautier* is applicable to the facts herein. Consequently, I am of opinion that the plaintiffs are justified in calling on the trustees to hand over to them the ten condominiums and the Cosyland shares for distribution amongst themselves.

[67] I do not regard cl. 9 as inconsistent with the application of the rule in *Saunders v. Vautier*. In my judgment that clause governs the approach of the trustee to the exercise of the direction to sell only as long as the trust is subsisting. The plaintiffs as beneficiaries who are *sui juris* and together entitled to the whole beneficial interest of the trust can put an end to the trust.

Conclusion

[68] For the reasons given, I allow the plaintiffs application to end the trust for sale.